UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31

MARINA DEL REY HOSPITAL
and

CALIFORNIA NURSES ASSOCIATION, Case Nos. 31-CA-29929

and

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS WEST 31-CA-29930
31-CA-30191
31-CA-65298

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

To: Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C., 20570-0001

Submitted by:
Nicole A. Buffalano
Rudy Fong-Sandoval
Counsel for Acting General Counsel
National Labor Relations Board – Region 31
11500 West Olympic Blvd. – Suite 600
Los Angeles, CA 90064

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 1

II. RESPONDENT'S EXCEPTIONS 2

III. DISCUSSION

A. Respondent's non-substantive exceptions should be denied (R. Exceptions 1-2) ... 4

i. Respondent's exception 1 4
ii. Respondent's exception 2 4

B. Respondent's bare exceptions should be disregarded (R. Exceptions 6, 18, 27-33, 37, 39) 5

C. The ALJ's factual and legal findings that Respondent violated Section 8(a)(1) and (5) by revising its Appearance and Hygiene Policy without giving the Union notice and the opportunity to bargain over the change is well-supported by the record evidence and extant law (R. Exceptions 3-5, 8-16) 6

i. Respondent's bare exceptions should be denied (R. Exceptions 3-5, 8, 9, 15, 16) 6
ii. The ALJ's credibility determinations are well-grounded 7
a. Respondent's exceptions 10-14 7
b. Respondent's exception 3 14
c. Respondent's exception 4 14
d. Respondent's exception 5 17
e. Respondent's exception 8 18
f. Respondent's exception 9 18
g. Respondent's exception 9, 15, 16 19

D. The ALJ's factual and legal finding that Respondent violated Section 8(a)(1) by revising its Appearance and Hygiene Policy to prohibit the wearing of buttons, pins, and stickers in response to its employees' union activities is well-supported by the record evidence and extant law (R. Exceptions 7, 14, 17, 18) 21

i. The ALJ's credibility determinations are well-grounded 21
a. Respondent's exception 7 21
b. Respondent's exception 14 22
c. Respondent's exception 17 23
ii. The ALJ's legal findings are well-supported by extant law (R. Exception 18) 28

E. The ALJ's factual and legal finding that Respondent violated Section 8(a)(1) by maintaining an overly-broad off-duty access policy is

well-supported by the record evidence and extant law (R. Exceptions 19, 20, 23) 29

i. The ALJ's credibility determinations are well-grounded (R. Exception 20) 29
ii. The ALJ's legal conclusions are well-supported by extant law (R. Exceptions 19, 23) 30

F. The ALJ properly found that Respondent violated Section 8(a)(1) on August 20, 2010, when Patricia Heasley enforced Respondent's overly-broad off-duty access policy against employees (R. Exception 21) 34

G. The ALJ properly found that Respondent violated Section 8(a)(1) on September 21, 2011, when Julio Duarte enforced Respondent's overly-broad off-duty access policy against employees (R. Exception 22) 35

H. The ALJ's finding that Respondent violated Section 8(a)(1) and (5) by failing to make contributions to the SEIU and Joint Employer Education Fund is well-supported by record evidence and extant law (R. Exceptions 25, 26) .. 36

i. Respondent was obligated to maintain the status quo, including fund contributions, after the expiration of the CBA 37
ii. Contrary to Respondent's contentions, SEIU did not clearly and unmistakably waive its right to continued fund contributions 39
iii. Respondent's "sound arguable basis" interpretation-of-contract defense is not applicable to this unilateral change/failure to bargain 8(a)(5) allegation 43

I. Respondent's procedural exceptions should be denied as they fail to state on what grounds they are purportedly erroneous (R. Exceptions 34-36, 38) 44

i. Respondent's bare exceptions should be denied (R. Exceptions 34-36) 44
ii. The ALJ's remedies and orders are well-supported by extant law (R. Exceptions 34-36) 44
a. Respondent's exception 34 44
b. Respondent's exception 35 45
c. Respondent's exception 36 46
iii. Respondent's exception 38 46

IV. CONCLUSION 47

CASES

American Distributing Co., 264 NLRB 1413 (1982) 40

Asociacion Hospital Del Maestro, 283 NLRB 419 (1987) 27

Automotive Plastic Technologies, 313 NLRB 462 (1993) 27

Bath Iron Works Corp., 345 NLRB 499 (2005) 43

Belgrove Post Acute Care Center, 359 NLRB No. 77 (Mar. 13, 2013) 47

Cauthorne Trucking, 256 NLRB 721 (1981) 38, 41

City Market, Inc., 340 NLRB 1260 (2003) 27, 28

Earthgrains Co. & Bakery, 351 NLRB 733 (2007) 16, 21

Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) 47

Flexsteel Industries, 316 NLRB 745 (1995) 10

Hyatt Regency Memphis, 296 NLRB 259 (1989) 27

Jordan Marsh Stores, 317 NLRB 460 (1995) 27

KBMS, Inc., 278 NLRB 826 (1986) 40, 42

Lincoln Center for the Performing Arts, 340 NLRB 1100 (2003) 27, 44

LSF Transportation, Inc., 330 NLRB 1054 (2000) 35

Made 4 Film, Inc., 337 NLRB 1152 (2002) 37, 38

Marriott International, Inc., 359 NLRB No. 8 (Sept. 28, 2012) 33

Natico, Inc., 302 NLRB 668 (1991) 41

New Concept Solutions, LLC, 349 NLRB 1136 (2007) 6

N. D. Peters & Co., 321 NLRB 927 (1996) 37

Noel Canning v. NLRB, __ F.3d __, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).....4, 46, 47

Oak Harbor Freight Lines, Inc., 358 NLRB No. 41 (May 2012) 37, 39, 41, 46

Paramount Farms, Inc., 334 NLRB 810 (2001) 10, 11, 24

R.E.C. Corp., 296 NLRB 1293 (1989) 37

Saint Johns' Health Center, 357 NLRB No. 170 (Dec. 30, 2011) 32, 36

Saint Vincent's Hospital, 265 NLRB 38, 42, 46 (1982).....28

Schmidt-Tiago Construction Co., 286 NLRB 342 (1987) 37

Sodexo America LLC, 358 NLRB No. 79 (July 3, 2012) 30, 31, 32, 33, 36, 45

Stevens Creek Chrysler Jeep Dodge, Inc., 357 NLRB No. 57 (Aug. 25, 2011) 7

Sunshine Piping, Inc., 351 NLRB 1371 (2007) 6

Tri-County Medical Center, 222 NLRB 1089 (1976) 32, 33, 36

United States v. Allocco, 305 F.2d 704 (2d Cir. 1962) 47

United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) 47

USC University Hospital, 358 NLRB No. 132 (2012) 20

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel submits this Answering Brief in opposition to Respondent's Exceptions to Administrative Law Judge William G. Kocol's Decision in the captioned matters.[1] Counsel for the Acting General Counsel respectfully requests that the National Labor Relations Board ("Board") deny all of Respondent's exceptions.

I. PROCEDURAL HISTORY

This case was tried before the Honorable William G. Kocol on September 28 and October 17 and 18, 2012, in Los Angeles, California, based on a Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 31 on June 2, 2011, and amended on December 2, 2011 and May 30, 2012 ("Complaint"). The portions of the Complaint[2] that are relevant to the instant proceeding allege that Respondent Marina Del Rey Hospital ("Respondent") violated Section 8(a)(1) and (5) of the Act on May 14, 2010[3] by issuing the following written Appearance and Hygiene Policy: "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas," ("A&H Policy") without providing Service Employees International Union, United Healthcare Workers-West ("SEIU")

---

[1] References to the Administrative Law Judge's Decision will follow the format "ALJD (page number):line number(s)." References to the transcript will be cited as Tr. (page number):line number(s); references to exhibits will be cited as "R" for Respondent, "GC" for General Counsel, and "J" for Joint exhibits. References to Respondent's Brief in Support of its Exceptions will be cited as "R. Br. [page number]".

[2] The Third Consolidated Complaint and Notice of Hearing involved sixteen charges in addition to the ones addressed in this Post-Hearing Brief. Those were Case Nos. 31-CA-29927, 31-CA-30027, 31-CA-30143, 31-CA-30161, 31-CA-30200, 31-CA-30214, 31-CA-066063, 31-CA-066064, 31-CA-069336, 31-CA-071809, 31-CA-072356, 31-CA-077075. At the opening of the hearing, based on a non-Board settlement agreement between Respondent and SEIU, the Regional Director of Region 31 ordered that Complaint paragraphs 16(a) – (b) and 17(a) – (b) be dismissed and Case Nos. 31-CA-30027 and 31-CA-30161 be severed from the Complaint. (Joint Ex. 4). In addition, based on an informal settlement agreement, General Counsel moved to withdraw Complaint paragraphs 12(b), 12(d), 13(a)-(c), 14(a)-(c), 15(a)-(d), 17(c)-(d), 20, 21, and 23(a)-(d), relating to the twelve aforementioned case numbers. (Tr. 404:16-406:18). ALJ Kocol granted General Counsel's motion. (Tr. 404:16-406:18). Therefore, the case numbers remaining at issue in this proceeding are 31-CA-29929, 31-CA-29930, 31-CA-30191, and 31-CA-65298. The remaining Complaint paragraphs at issue in this proceeding are 12(a), (c), (e), and (f), 18(a) – (c), 19, and 22(a) – (c).

[3] All dates herein are 2010, unless otherwise noted.

with notice or the opportunity to bargain over the change; and in May 2011, by unilaterally ceasing to make contributions to the SEIU and Joint Employer Education Fund. The Complaint further alleges that Respondent violated Section 8(a)(1) of the Act, by the following conduct: (a) on May 14, issuing the written A&H Policy described in the preceding sentence in response to its employees' activities on behalf of SEIU, and to discourage its employees from joining or assisting SEIU; (b) on or around May 17, September 16, October 26, and November 9, 2011 (two instances) by applying the unlawfully promulgated A&H policy against employees who wore SEIU insignia during work time; (c) at all relevant times maintaining an overly broad off-duty access policy; and (d) on September 24 and September 21, 2011, enforcing Respondent's overly broad off-duty access policy against employees.

On January 16, 2013, the Administrative Law Judge ("ALJ") issued his Decision finding merit to the aforementioned allegations set forth in the Complaint, except the allegation that the Respondent violated Section 8(a)(1) of the Act by enforcing its unlawful off-duty access policy against an employee on September 24.[4]

II. RESPONDENT'S EXCEPTIONS

Respondent takes 39 exceptions to the Decision of ALJ Kocol. There are six different categories of Respondent's exceptions, which are described below.

Respondent's exceptions 1 and 2 are non-substantive objections, irrelevant to the merits of the case. Respondent's exception 1 takes exception to ALJ Kocol's decision to strike Respondent's denial of service of the charges in its Answer, and Respondent's exception 2 excepts to a grammatical error in his Decision.

[4] Counsel for the Acting General Counsel is not filing exceptions to the ALJ's decision that Respondent did not violate Section 8(a)(1) on September 24, 2010, by enforcing its overly broad off-duty access policy against an off-duty employee.

Nine of the Respondent's exceptions, namely 18, 27-32, 37, and 39, object to ALJ Kocol's findings of fact and/or legal conclusions without providing any specifically articulated grounds for the objection. To this end, in exception 18, Respondent generally excepts to the ALJ's conclusions of fact and law that the Respondent engaged in the violations of Section 8(a)(1) based on the summary of facts as described by the ALJ in pages 8 to 10 of his decision. In its exceptions 27 through 32, Respondent generally excepts to each of the ALJ's conclusions of law that Respondent violated the Act as alleged in the Complaint. In exception 37, Respondent generally excepts to "all rationales, findings, conclusions, remedies and orders of the ALJ that are inconsistent with the exceptions." Finally, in exception 39, Respondent generally excepts to the ALJ's failure "to consider and address all issues, arguments and evidence advanced by the Employer in its Post-Trial Brief."

Fifteen of Respondent's exceptions, namely 3-17, relate to ALJ Kocol's finding that the Respondent violated Section 8(a)(1) and (5) of the Act by: 1) revising its A&H Policy without first giving SEIU an opportunity to bargain about the change; and 2) making this revision in response to its employees' union activities.

Six of Respondent's exceptions, namely exceptions 19-24, relate to ALJ Kocol's finding that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an overly broad no-access rule.

Two of Respondent's exceptions, namely 25 and 26, relate to the ALJ's finding that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally failing to make payments to the Education Fund.

Finally, exceptions 33-36 concern procedural objections to ALJ Kocol's Recommended Order, and exception 38 raises a defense based on the United States Court of Appeals for the

District of Columbia Circuit's decision in *Noel Canning v. NLRB,* __ F.3d __, No. 1201115, 2013 WL 276024 (D.C. Jan. 25, 2013).

For the reasons set forth below, Respondent's exceptions should be denied in their entirety.

III. DISCUSSION

A. Respondent's non-substantive exceptions should be denied (R. Exceptions 1-2)

i. Respondent's exception 1

ALJ Kocol noted that Respondent's denial in its Answer to the filing and service of the charges was, "clearly frivolous and, on [his] own motion, [he struck] it." (ALJD 2:8-16). In its exception 1, Respondent excepts to ALJ Kocol's decision to strike Respondent's denial of the filing and service of the charges.

Respondent's exception is irrelevant to the merits of the case, and ALJ Kocol's decision to strike Respondent's answer with respect to the filing and service of the charges is made further irrelevant because, as found by the ALJ, "[i]n any event the formal papers clearly establish that the charges were filed and served as alleged in the complaint." (ALJD 2:15-16; G.C. Ex. 1 (j)-(r), 1(nn)-(ss)).

Because Respondent's exception 1 is irrelevant to the proceeding, it should be denied.

ii. Respondent's exception 2

In his decision, the ALJ began a sentence "the entire record..." (ALJD 2:19). Respondent excepts to the ALJ's error on the grounds that it appears that a portion of his decision is missing. On the contrary, there is no indication that a portion of the ALJ's decision is missing. Instead, it appears that the ALJ omitted the word "on," before "the entire record."

Therefore, ALJ Kocol's omission is irrelevant to the merits of this case, and Respondent's exception 2 should be denied.

B. Respondent's bare exceptions should be disregarded (R. Exceptions 6, 18, 27-33, 37, 39)

Respondent's exceptions 6, 18, 27-33, 37, and 39, generally except to the ALJ's findings of fact and law, and Respondent fails to state, either in the exceptions or in its brief, on what grounds the ALJ's findings or conclusions should be overturned. In exception 6, Respondent excepts to the ALJ's "characterization" of director of human resources, Margaret Morgan's ("Morgan") testimony and Respondent's exception 18 objects to the ALJ's summary of facts contained in pages 8-10 of his Decision describing various incidents when Respondent enforced its A&H Policy against employees wearing SEIU insignia. In exceptions 6 and 18, Respondent fails to state how the ALJ erred in characterizing Morgan's testimony as dishonest, or how any fact in the contested two-page summary is incorrect. Similarly, Respondent's exceptions 27-32, except to the ALJ's conclusions of law with respect to each violation, but again fail to provide any specific grounds for the objections. Respondent's exception 33 excepts to the ALJ's remedy and Order that Respondent "cease and desist from engaging in alleged unfair labor practices and take certain affirmative actions designed to effectuate the policies of the Act." Respondent fails to provide any specific grounds for its exception or to explain on what grounds the ALJ's remedy and Order should be overturned. Finally, Respondent's exceptions 37 and 39, except to all of the ALJ's "rationales, findings, conclusions, remedies, orders of the ALJ that are inconsistent with the Respondent's exceptions," and the ALJ's failure to consider and address all "issues, arguments and evidence" advanced by Respondent in its Post-Hearing Brief, respectively. Again, in support of exceptions 37 and 39, Respondent fails to provide any specific grounds for its exception or to explain on what grounds the ALJ's conclusions should be overturned.

As a threshold matter, Respondent's exceptions 6, 18, 27-33, 37, and 39, fail to comply with the requirements of 102.46(b) of the Board's Rules and Regulations. Section 102.46(b)(1) provides, in pertinent part:

> Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Because Respondent's exceptions 6, 18, 27-33, 37, and 39 fail to concisely state the grounds for the objection, Respondent's exceptions fail to meet the requirements of Section 102.46(b)(1); and, therefore, Respondent's exceptions 6, 18, 27-33, 37, and 39 should be denied. *Sunshine Piping, Inc.*, 351 NLRB 1371, n.1 (2007)(Board disregarded "bare exceptions" that were unsupported by argument); *see also, New Concept Solutions, LLC*, 349 NLRB 1136, n.2 (2007)(Board disregarded "bare, unsupported exceptions"). Respondent's exception 6 should be further denied for failing to comply with the requirements of 102.46(b), because Respondent does not explain any question or procedure, fact, law, or policy to which its exception is taken.

C. The ALJ's factual and legal findings that Respondent violated Section 8(a)(1) and (5) by revising its Appearance and Hygiene Policy without giving the Union notice and the opportunity to bargain over the change are well-supported by the record evidence and extant law (R. Exceptions 3-5, 8-16)

i. Respondent's bare exceptions should be denied (R. Exceptions 3-5, 8, 9, 15, 16)

In its exceptions 3-5, 8, 9, 15, 16, Respondent excepts to various factual findings by ALJ Kocol in concluding that the Respondent violated Section 8(a)(1) and (5) of the Act in May 2010, by unilaterally implementing a prohibition on the wearing of buttons, pins, and stickers in patient care areas. Respondent's exceptions 3-5, 8, 9, 15, and 16, provide no grounds, in either its exceptions or in its brief, that ALJ Kocol's factual findings should be overturned. As

described more thoroughly above in Section B, where, as here a Respondent fails to state on what grounds the purportedly erroneous findings or conclusions should be overturned, the exception should be denied for failing to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations.

In addition, Respondent's exceptions 3-5, 8, 9, 15, and 16, should be denied because the ALJ's factual and legal findings are well-supported by the record evidence, for the reasons stated below.

ii. The ALJ's credibility determinations are well-grounded

The Board's long-established policy is not to override an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence demonstrates them to be wrong. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951). It is well settled that the Board is reluctant to overturn the credibility findings of an Administrative Law Judge, and that "only in rare cases" will it do so. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, slip op. at *5 (Aug. 25, 2011). This is particularly true when credibility findings are based on a judge's assessment of the demeanor of a witness. *Id.*

a. Respondent's exceptions 10-14

There is no merit to Respondent's exceptions 10-14, which object to the ALJ's decision to credit Acting General Counsel witnesses Paulette Navarro ("Navarro"), Gloria Gilmore ("Gilmore"), Marla Liberty ("Liberty"), Mary Brown ("Brown"), and Flora Falcon ("Falcon") in finding that prior to May 14, Respondent did not have a policy or practice of prohibiting employees from wearing non-hospital issued buttons, pins, and stickers in patient care areas.

In his decision, ALJ Kocol generally rejected "as a matter of fact" the conclusion that prior to May 14, Respondent had a practice or policy of prohibiting employees from wearing

non-hospital issued buttons, pins, and stickers in patient care areas. (ALJD 7:33-34). Specifically, in making his factual conclusion, ALJ Kocol credited the testimony of Acting General Counsel's witnesses Brown, Navarro, Gilmore, Liberty, and Falcon that they had worn many different kinds of buttons prior to May 2010 without incident, over the testimony of Respondent's witnesses', Morgan, Patricia Heasley ("Heasley"), and Tammie Bean ("Bean"). (ALJD 5:30-7:13, 7:28-34). In doing so, ALJ Kocol properly observed the demeanor the witnesses and detailed the reasons why he credited or discredited certain testimony and other evidence.

Importantly, ALJ Kocol specifically discredited the testimony of human resources director Morgan that Respondent had a practice of prohibiting employees from wearing non-hospital issued buttons, pins, and stickers in patient care areas since 2004. (ALJD 5:30-39). ALJ Kocol correctly noted that Morgan's testimony on this point was "obtained in a leading fashion, [her] demeanor was unconvincing, and it is contrary to the more credible testimony..." of the Acting General Counsel's witnesses. (ALJD 5:30-38.) Similarly, with respect to the testimony of Respondent witness department manager of telemetry, med surg, and orth spine, Heasley, ALJ Kocol explained that she did not strike him "as a particularly credible witness; rather she seemed eager to agree with the [Respondent's] litigation position rather than simply attempting to relate the facts." (ALJD 6:45-49). Finally, while Kocol did not specifically address the credibility of the director of rehab services, Bean regarding her testimony on this point, ALJ Kocol concluded that all of the evidence relied on by Respondent in arguing that prior to May 14, Respondent had such a practice of prohibiting non-hospital issued buttons, pins, and stickers in patient care areas was "not...credible." (ALJD 7:32-33).

In addition, ALJ Kocol's finding that prior to May 2010 Respondent did not have a practice of prohibiting the wearing of buttons, pins, and stickers in patient care areas, is well supported by the record. To this end, Acting General Counsel's witnesses' testimony was internally consistent and was corroborated by each other's testimony. All five of the Acting General Counsel's witnesses, including current employees Falcon, surgical technologist, Brown, physical therapist assistant, and Navarro, licensed clinical social worker, and former employees Liberty, part time registered nurse, and Gilmore, testified that prior to May 2010, they were not aware of any Respondent policy restricting or limiting employees' wearing of buttons, pins, and stickers anywhere on their person or anywhere in the hospital. (Tr. 68:8-14, 149:12-13, 168:3-169:11, 193:2-3, 197:4-6, 297:20-21, 302:17-18, 303:19-24, 315:4-316:11, 316-11, 319:22-23, 328:2-7). More specifically, the testimony of Liberty, Gilmore, and Brown revealed that on various occasions they have worn little red dress pins for women's heart research,[5] sports team pins,[6] breast cancer awareness pins,[7] "fight for a fair economy" pins, Jingle for Jesus pins,[8] a Jamaican flag pin,[9] a service award pin from another hospital,[10] and a "fight for a fair

[5] Marla Liberty wore the little red dress button on the shoulder of her uniform every time she worked during the month of February each year beginning in the early 2000s until February 2012, without incident. (Tr. 197:19-20, 199:4-21, 200:18-19). Mary Brown wore the little red dress pin prior to Spring 2010, about six times a year, although she was unable to recall the first time that she wore it, until she wore it most recently in March 2012. (Tr. 328:22-25, 331:3-23).

[6] Marla Liberty testified to seeing her co-workers wearing sports pins during football playoffs, and to wearing at least one team pin during one football playoffs during the time that she was employed by Respondent. (Tr. 197:14-18, 199:22-200:9).

[7] Marla Liberty wore a breast cancer awareness pin every day that she worked each October between the late 1990's through 2010, and on occasion to support a co-worker who had breast cancer. (Tr. 197:14-15, 197:23-198:199:3). Marla Liberty was never asked to remove her breast cancer awareness button. (Tr. 200:16-17). Mary Brown similarly testified to wearing a breast cancer awareness pin on the shoulder of her scrubs about two to three times a week every October and March between 2000 and 2012. (328: 16-23; 329:23-330:16). Mary Brown was never asked to remove her breast cancer awareness button. (Tr. 330:19-331:2).

[8] Gilmore testified that she wore a Jingle for Jesus button for at least three weeks during the holiday season in 2009. (G.C. Ex. 22, No. 1; Tr. 151:17-153:5, 244:9-16).

[9] Gilmore testified that she wore a Jamaican flag pin about four times a month during 2009. (G.C. Ex. 22, No. 4; Tr. 157:4-159:7, 244:9-16).

[10] Gilmore testified that she wore a service award pin from another hospital on and off in 2009 and 2010 (G.C. Ex. 22, No. 5; Tr. 159:17-16, 244:9-16).

economy"[11] pin without incident. (Tr. 151:23-152:3, 152:22-152:5, 158:10-13, 160:19-21, 216:16-217:2, 217:10-218:3, 226:15-20, 321:22-322:17, 328:2-7, 333:19-5). Further, Brown, Falcon, and Liberty also testified that prior to May 14, they had seen other employees wearing buttons on their uniforms, including sports team buttons, cartoon character buttons, SEIU and CNA buttons, support breast cancer research buttons. (Tr. 200:22-201:11, 219:8-20, 300:15-24, 333:2-13). In addition to corroborating one another, three of the five Acting General Counsel witnesses, including Brown, Navarro, and Falcon were current employees at the time that they testified. (Tr. 62:1-7, 297:13-19, 319:15-21). Therefore, their testimony is inherently credible, and should be credited over the self-serving testimony of Respondent witnesses. (Tr. 429:434:4, 455:14-456:23, 566:5-567:13, 598:21-599:9). *Paramount Farms, Inc.*, 334 NLRB 810, 813 (2001); *Flexsteel Indus.*, 316 NLRB 745, 745 (1995)("the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.").

Further, Respondent's evidence in this regard was properly discredited by the ALJ because it was non-specific, inconsistent, self-serving, and unlikely when considered alongside other credible evidence. First, despite having two policies regarding employees' appearance and hygiene prior to May 14, one in its Human Resources Policies and Procedures Manual ("Manual") and one in the employee handbook, not only did neither prohibit the wearing of buttons, pins, or stickers under any circumstances, but neither even mentioned the wearing of buttons, pins, and stickers. (G.C. Ex. 18, 19, 20; J. Ex. 3). Despite the testimony of five employee witnesses that there was no policy against wearing buttons, pins, and stickers, and the lack of a written policy prohibiting the wearing of buttons, pins, and stickers, Respondent

[11] Gilmore testified that she wore a "fight for a fair economy" pin on at least one occasion in 2009 (G.C. Ex. 22, No. 7; Tr. 164:10-165:9).

presented three witnesses who provided the self-serving testimony that such a policy has always existed. To this end, Respondent witness Heasley's testimony was inconsistent, first testifying that Respondent's policy had always been to prohibit unauthorized buttons, pins, and stickers in patient care areas, then admitting that she could not distinguish between the different versions of the A&H Policies in the Manual, some which included the restriction on buttons, pins, and stickers, and some which did not, G.C. Exs. 18, 19, 20, and ultimately conceding that she enforced whatever A&H policy was in the Manual at that time, which, prior to May 14, did not include the prohibition on the wearing of buttons, pins, and stickers. (Tr. 421:11, 441:24-16).

In an attempt to corroborate the Respondent witnesses' general and self-serving testimony, Bean, Heasley, and Morgan all testified that they had told an employee or employees to take off a button, pin, or sticker on at least one occasion. (Tr. 357:5-24, 432:17-434:4, 437:5-16, 554:18-555:8, 580:12-14). Bean's only testimony regarding enforcement was her instruction to current employee Mary Brown to remove a Mary Kay pin, and is disputed by the testimony of Mary Brown whose testimony is inherently more credible because, as a current employee, she is testifying against her pecuniary interest. (Tr. 356:22-357:2, 554:8-555:7). *Paramount Farms, Inc.*, *supra*; *Flexsteel Industries*, *supra* ("the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."). And, although Heasley testified to three alleged incidents of enforcement of the unwritten policy, she was unable to testify that any of the three incidents occurred before May 14, as opposed to after; (i) on an unknown date Heasley told Stewart to remove a cookie-sized CNA button; (ii) in 2010, Heasley told an unidentified nursing supervisor to remove a button with angel wings; and (iii) around September or October, Heasley told Mary Brown to remove a button. (Tr. 357:5-24, 432:17-434:4, 437:5-16,554:18-555:8).

Morgan testified that enforcement of the policy occurred around March of 2009 when, "nurses [were] wearing buttons in patient care areas and we had to tell them to remove them." (Tr. 580:12-14). In an attempt to bolster Morgan's testimony, Respondent offered an e-mail dated March 12, 2009, from California Nurses Association ("CNA") representative Anthony Predelitto ("Predelitto") to Morgan requesting that Respondent cease and desist from "ban[ning] [the] wearing of [CNA] buttons/stickers." (R. Ex. 11; Tr. 575:22-576:11). Predelitto's vague e-mail regarding what actually occurred in March of 2009 is not probative to show that Respondent maintained an unwritten practice with respect to buttons, pins, and stickers, and aside from Morgan's testimony that "[t]hey were asked to take them off in patient care areas," Respondent conveniently failed to offer any specific evidence regarding what instruction, if any, was given to employees vis-a-vis their CNA pins, the circumstances of those instructions, and to or by whom the instructions were made. (Tr. 577:5-10).

Finally, despite the ALJ's proper credibility findings and the substantial evidence that supports his conclusion, Respondent argues that the ALJ erred in discrediting the three Respondent witnesses on this point because their testimony is supported by (i) a March 2009 email from CNA representative showing that the Employer was prohibiting employees at that time from wearing CNA buttons, pins, and stickers, (ii) the failure of CNA to file a charge on this issue, or to join SEIU in this charge, and (iii) because SEIU did not provide a witness to testify to the Employer's policy prior to May 2010, and was not in a position to know the Employer's policy because SEIU had six different representatives between December 2009 and April 2012. (R. Br. 16-18).

Respondent's arguments are not compelling. First, as described above, the March 12, 2009 e-mail from Prediletto to Morgan does not prove that Respondent had a policy at that time

of prohibiting the wearing of non-hospital issued buttons, pins, and stickers, in patient care areas. At most, the email shows that around March 2009, employees were instructed to remove CNA buttons. In fact, this e-mail tends to show that Respondent did not have a policy prohibiting the wearing of buttons, pins, and stickers in patient care areas or the employees and CNA would not have reacted to the enforcement of Respondent's long standing, uniformly enforced policy. Second, Respondent's argument that CNA's failure to file a charge that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally revising the A&H Policy in its Manual in May 2010, shows that Respondent had always maintained such a policy and that is why CNA did not file such a charge is not supported by the record evidence. The Respondent does not cite to any evidence in the transcript or any exhibit that would support of its assertion. That is because there is nothing in the record that reflects whether or not CNA filed such a charge, and what, if anything, was the result of that charge. As a result, there is no probative evidence to be gleaned from Respondent's argument. Finally, Respondent's argument that SEIU's frequent turnover of representatives resulted in ignorance of Respondent's long standing past practice with respect to buttons, pins, and stickers is unconvincing as SEIU's knowledge or lack thereof of Respondent's practice is utterly irrelevant in this proceeding to establish what the Respondent's practice was prior to May 14. Respondent argument ignores that ALJ Kocol properly credited the Acting General Counsel's current and former employee witnesses regarding what the Respondent's policy was before May 2010 with respect to buttons, pins and stickers, versus the testimony of Respondent's witnesses on the same issue, as described more fully above in Section C(ii). What SEIU thought or knew about the Respondent's policies is irrelevant in light of the overwhelming evidence on the subject from five employee witnesses and three Respondent witnesses.

ALJ Kocol's credibility resolutions should not be overturned as they are well articulated, based on the observation of the witnesses' testimony, and are well-supported by the evidence. Therefore, Respondent exceptions 10-14 should be denied.

b. Respondent's exception 3

There is no merit to Respondent's exception 3, that objects to the ALJ's finding that Respondent's handbook's section entitled "Appearance and Hygiene" did not mention anything about the wearing of buttons or pins. (ALJD 3:15-20). Although the ALJ does not point to the testimony or other evidence upon which he relied in making his finding, his finding is well supported by the record evidence. (ALJD 3:15-20).

Respondent stipulated and Morgan testified that Joint Exhibit 3 is the current version of the employee handbook, has been in effect since January 1, 2001, and that it does not contain any reference to "pins or buttons in patient care areas or non-patient care areas." (Tr. 15:19-16:7, 57:11-15). A review of the employee handbook itself also establishes that there is no reference to buttons or pins therein. (See J. Ex. 3). Because the evidence establishes that the employee handbook has never referenced buttons, pins, or stickers, Respondent's exception 3 should be denied.

c. Respondent's exception 4

There is no merit to Respondent exception 4, which objects to the ALJ's finding that copies of the Manual are located on shelves in the departments of the Hospital and are used as needed by managers and supervisors, but rarely used by employees. (ALJD 3:24-32).

ALJ Kocol based his finding on the credibility of Acting General Counsel's witness, Navarro, and, as described more thoroughly above in Section C(ii), on page 7, the Board's established policy is not to overrule an ALJ's credibility resolution unless the clear

preponderance of all the relevant evidence establishes that they are incorrect. Here, ALJ Kocol credited the testimony of Acting General Counsel witness Navarro that was that she was aware of the existence of manuals in offices at the Hospital, but has never had occasion to examine its content, found that her testimony was "credible."

ALJ Kocol's finding that employees rarely had occasion to use the Manual is well supported by the record evidence. No evidence was offered at the hearing by Respondent that would establish that employees had occasion to use the Manual. The credible evidence establishes that Respondent's employees were never made aware of the Manual's existence, prior to May 14, when Respondent revised and posted the revised A&H Policy from the Manual. The Manual itself was never offered by the Respondent so one can only speculate as to its purpose, but the name itself (Human Resources Policies and Procedures Manual) suggests that it is a manual intended for managers and supervisors. In addition, despite Morgan's testimony that employees were told of the existence of the Manual at orientation, the testimony of employees Navarro, Liberty, Falcon and Brown indicate that employees were not aware of the Manual through orientation or by any other source.[12] (Tr. 59:14-17, 78:9-15, 194:25-195:2, 297:22-24, 313:17-20, 319:24-320:18). When pressed on cross-examination about her assertion that employees were made aware of the Manual at their orientation, Morgan defended that her testimony is corroborated by a checklist that employees sign at orientation to indicate that they have been informed of the Manual. (Tr. 597:4-598:11). It is perplexing, and highly unlikely, that in the event such a document exists, that the Respondent would not have presented it at the hearing. In fact, Respondent's failure to produce the checklist to corroborate Morgan's testimony, a document that is within Respondent's control, supports the inference that there is no

[12] To the extent that Falcon testified that she was aware of an A&H policy similar to the one in the Manual, the policy that Falcon testified that she had seen was located in the Infection Control Policies and Procedures Manual, and not in the Manual. (Tr. 315:1-25).

checklist and that documents in Respondent's control do not support Morgan's testimony. *Earthgrains Co. & Bakery*, 351 NLRB 733, 738 (2007) (employer's failure to produce documents in its control to corroborate its claims support an inference that documents would be unfavorable to the employer).

Further, Heasley's unsubstantiated claim that she informed employees in her units, including telemetry, med surg and ortho spine, of the Respondent's A&H policy in the Manual at bi-annually employee meetings is not supported by specific testimony as the only example that she gave of when she told her employees about the A&H policy in the Manual is to inform them that they could not wear hoodies. (Tr. 417:6-9, 420:3-24). Notably, nothing in the Manual A&H policy says anything specifically about hoodies. (G.C. Exs. 18-20). Heasley's testimony that employees were made aware of the Manual because "copies of the policies" were "posted on the bulletin boards" is equally unsubstantiated. (Tr. 420:20-24). Heasley failed to provide any details regarding the location of the bulletin boards or which portions of the Manual she allegedly posted on the bulletin board.

No evidence was offered by Respondent to show that the Manual was maintained somewhere other than shelves in each department, and ALJ Kocol's finding in this regard is supported by the evidence. To this end, the only witness that testified regarding the location of the Manual, Heasley, testified that they were located in a cabinet or on shelves alongside other departmental manuals, located within each department. (Tr. 446:1-448:2). Bean testified that she did not know where to locate a copy of the Manual (Tr. 562:15-563:3).

Because ALJ Kocol's finding that the Manual was located on shelves in the departments, that managers and supervisors used the Manual but employees rarely did, is supported by the record evidence, Respondent's exception 4 should be denied.

d. Respondent's exception 5

There is no merit to Respondent's exception 5, which excepts to ALJ Kocol's finding that on or around May 14, the version of the A&H Policy in the Manual was revised to include a rule that "unless issued by the Respondent, buttons, pins and stickers could not be worn in patient care areas," but that Respondent did not similarly revise the employee handbook. (ALJD 3:39-4:9, 4:36-38).

In making his finding, ALJ Kocol relied on the admission of Respondent witness Morgan. (ALJD 4:35-37). Morgan admitted that the A&H Policy was revised; and, further, emails from Morgan to her staff dated May 14, informing them of the revised policy, show that the Manual A&H Policy was revised around May 14. (R. Exs. 12-13; Tr. 574:22-575:20, 585:7-24, 594:15-595:4). In addition, the testimony of Brown, Gilmore, and Navarro that the revised policy was posted in the cafeteria and break rooms of each department and provided personally to them around May 14, further corroborate that the revised policy was implemented around the same date. (Tr. 78:9-15, 194:25-195:2, 301:24-302:2, 303:17-20, 314: 2-5, 319:24-320:8). Finally, in its Brief in Support of its Exceptions, Respondent admits that the policy in the Manual was revised to include the rule that employees could not wear non-hospital issued buttons, pins, and stickers in patient care areas. (R. Br. 8).

Finally, that the employee handbook was not similarly revised is also well supported by the record evidence. The employee handbook in Joint Exhibit 3, admittedly was effective from January 1, 2001 to the date of the hearing, and contains no reference to buttons, pins, and

stickers. (J. Ex. 3; Tr. 15:19-16:1, 56:15-17). Therefore the credible evidence establishes that the employee handbook was not revised around May 14 to include the rule relating to buttons, pins, and stickers.

Because ALJ Kocol's finding is supported by the record evidence, Respondent's exception 4 should be denied.

e. Respondent's exception 8

There is no merit to Respondent's exception 8, which objects to the ALJ's finding that after Morgan's May 14 email to her staff attaching a copy of the revised A&H Policy in its Manual, the supervisors began to enforce that policy, and employees began to complain to SEIU about that enforcement. (ALJD 43-46).

To the extent that Respondent excepts to the ALJ's finding on the grounds that Respondent maintained the policy since at least 2004, and, therefore, did not begin to enforce this policy around May 2010, as described in C(ii)(a), PAGE, the ALJ properly found that Respondent did not have such a practice, and, for that reason, Respondent's exception should be denied.

f. Respondent's exception 9

There is no merit to Respondent's exception 9, which objects to ALJ Kocol's finding that Respondent's revised policy became widely known to employees in writing around May 21, when Respondent posted the revised policy in the break rooms.[13] (ALJD 5:3-29).

---

[13] To the extent that exception 9 excepts that ALJ Kocol erred in finding that what Respondent posted in the break rooms was Morgan's May 21 e-mail, and not the attachment to the email, ALJ Kocol's recitation of the contents of what Respondent posted in the break rooms was an error. ALJ Kocol states that what was posted on the bulletin boards read:

> SEIU is objecting to our policy regarding prohibition of non hospital issued badges, buttons, etc. They have communicated this objection via flyers (which you will see on their bulletin boards) and letters.
> Our policy is legal and has been supported by case law. We *are* legally able to prohibit the wearing of such items in patient care areas.

While ALJ Kocol did not specifically describe the basis for his factual finding, it is well supported by the record evidence. To this end, as described more thoroughly in Section C(ii)(a), above, current and former employees testified that prior to May 2010, the Respondent did not have a policy prohibiting the wearing of buttons, pins, and stickers. Further, current and former employees Brown, Navarro, and Gilmore all testified that they became aware of the revised A&H Policy around May 14, when they were given a copy of the revised A&H Policy, or when they saw the revised A&H Policy posted in the break room or the cafeteria of their departments. (Tr. 78:9-15, 194:25-195:2, 303:6-14, 313:17-20, 319:24-320:8, 585:7-24). Moreover, an e-mail from Morgan to the Respondent's directors and administrators dated May 21, attaching the revised A&H Policy, and asking them to post the revised policies in the break room of their department, and informing them that it would be posted in the cafeteria and at the employee entrance, corroborates the testimony of the Acting General Counsel's witnesses and shows that around May 21, Respondent posted its revised A&H Policy in its Manual in its break rooms. (R. Ex. 13).

Because ALJ Kocol's findings are supported by the record evidence, Respondent exception 9 should be denied.

g. Respondent's exceptions 9, 15, 16

There is no merit to Respondent's exceptions 9, 15, and 16, which take issue with the ALJ's finding that by revising its A&H Policy around May 2010 without providing the Union with notice or the opportunity to bargain, Respondent violated Section 8(a)(1) and (5) as alleged in the Complaint. (ALJD 5:26-28).

Be sure to enforce this policy uniformly. Let me know if you have any questions.
What was posted in the break rooms on or around this time was the attachment to this May 21, e-mail, namely, the revised Appearance and Hygiene Policy in the Manual, or G.C. Ex. 19. ALJ Kocol's error has no effect on the outcome of his credibility resolutions or his factual findings.

In exceptions 9, 15 and 16, citing *USC University Hospital*, 358 NLRB No. 132, slip op. at 18-19 (2012), Respondent argues that because it had a past policy of prohibiting employees from wearing non-hospital issued buttons, pins, and stickers in patient care areas since at least 2004, its revision to the A&H Policy in May 2010 to codify the prior practice was not a "change" over which the Respondent was obligated to bargain with SEIU. (R. Br. 12-13, 16-17). The argument is unavailing to Respondent in this case because, as described above in Section C(ii)(a), the ALJ properly rejected Respondent's assertion that prior to May 14 it had a policy of prohibiting employees from wearing non-hospital issued buttons, pins, and stickers in patient care areas.

In addition, although Respondent provides no other grounds to overturn ALJ Kocol's factual finding that the Respondent did not give SEIU notice and the opportunity to bargain over the May 14 revision to its A&H Policy. To the extent that Respondent excepts that Respondent did provide SEIU with notice or the opportunity to bargain over its May 14 revision to its A&H Policy, Respondent's exception should be denied because the ALJ's factual finding is well supported by the record evidence. First, there is absolutely no credible evidence to support that the Respondent provided SEIU with notice or the opportunity to bargain prior to its May 14 revision to its Manual. To this end, the only evidence that suggests that the Respondent ever communicated with SEIU about the revision to their policy was the testimony of Morgan that she "believes" she attached the revised A&H policy to an e-mail that she sent it to an unnamed SEIU business representative in 2010. (Tr. 54:3-10). Morgan's testimony in this regard was properly not credited, although ALJ Kocol did not specifically address the reason for his finding. Morgan's testimony should not be credited because it was general, non specific, and unsubstantiated by any documentary evidence. Even if she did attach G.C. Ex. 19 to an e-mail to

an SEIU business representative "in 2010," there is nothing to suggest that she did so prior to May 14, when Respondent issued the Revised A&H Policy to its employees. Further, Respondent's failure to produce the purported e-mail warrants an inference that there is no e-mail supporting Morgan's claim that she notified SEIU. Because the purported e-mail would be within the Respondent's control, Respondent's failure to produce it supports an inference that the documents in their possession do not support Morgan's testimony. *Earthgrains Co. & Bakery*, *supra* (employer's failure to produce documents in its control to corroborate claims supports inference that documents were unfavorable).

Further, the uncontroverted testimony of SEIU representative Rosanna Mendez shows that SEIU did not become aware of the revision to the Manual until it was told of the change by its employee members. (Tr. 368:9-18).

Because ALJ Kocol's findings are well-supported by the record, Respondent's exception 9, 15, and 16 should be denied.

D. The ALJ's factual and legal finding that Respondent violated Section 8(a)(1) by revising its Appearance and Hygiene Policy to prohibit the wearing of buttons, pins, and stickers in response to its employees' union activities is well-supported by the record evidence and extant law (R. Exceptions 7, 14, 17, 18)

i. The ALJ's credibility determinations are well-grounded (R. Exceptions 7, 14, 17)

a. Respondent's exception 7

There is no merit to Respondent's exception 7, which objects to ALJ Kocol's finding that Morgan admitted that Respondent revised the A&H Policy in its Manual because employees wore CNA buttons in March 2009. (ALJD 4:35-36).

First, in support of exception 7, Respondent provides no grounds, in either its exceptions or in its brief, that ALJ Kocol's factual findings should be overturned. As described more thoroughly above in Section B, on page 5, where, as here a Respondent fails to state on what

grounds the purportedly erroneous findings or conclusions should be overturned, the exception should be denied for failing to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations. In addition, Respondent's exception 7, should also be denied because it is well-supported by the record evidence.

Both Morgan's testimony and Respondent Counsel's Brief in Support of Its Exceptions, state that incidents in March and December 2009, caused Respondent to revise its A&H Policy in its Manual in spring 2010. (Tr. 575:22-580:22; R. Br. 7-8). In her testimony, Morgan admitted that an e-mail dated March 12, 2009, from Prediletto contesting Respondent's instruction to employees to remove their CNA buttons, was identified by Morgan as one of two instances that brought about the revision to the A&H Policy in the Manual. (Tr. 580:2-10; G.C. 13).

Because the ALJ's finding that employees wearing union buttons in March 2009 caused the Respondent to revise the A&H Policy in its Manual, Respondent exception 7 should be denied.

b. Respondent's Exception 14

There is no merit to Respondent's exception 14, which objects to ALJ Kocol's decision to include in his recitation of facts hearsay testimony of Flora Falcon that other employees complained to her "that managers were telling them to remove buttons or that they could only wear one button." (ALJD 6:28-30).

Federal Rule of Evidence 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Falcon's testimony regarding the conversations with her co-workers about the various instructions given to them relating to buttons was not offered to prove the truth of what Falcon's unnamed co-workers purportedly told Falcon. To the contrary, the evidence was

offered to provide context for the reason why Falcon called the meeting with Hunter and their conversation in that meeting. Because the testimony was not offered to prove establish the truth of what Falcon's unnamed co-workers said to her, it does not constitute hearsay and the ALJ properly admitted the evidence.

Further, there is nothing in the ALJ's decision that suggests that he relied on Flora's hearsay testimony about her conversations with co-workers in making his decision on the merits of this case. Aside from its general objection to the ALJ's finding in relation to Falcon's otherwise hearsay testimony, Respondent makes no specific arguments regarding how the ALJ erred in making his decision or in including the hearsay evidence in his recitation of facts to which the Acting General Counsel can respond.

Because Falcon's testimony was not offered to prove the truth of the matter asserted, and because there is nothing to suggest that ALJ Kocol relied on Falcon's otherwise hearsay testimony to prove the truth of Falcon's co-workers' statements to her, Respondent's exception 14 should be denied.

c. Respondent's exception 17

There is no merit to Respondent's exception 17, which objects to ALJ Kocol's finding that the Employer revised its A&H Policy in the Manual in May 2010 because of the employees' union activities. (ALJD 7:42-48).

ALJ Kocol concisely set forth the facts and credibility resolutions that led him to his conclusion. (ALJD 3:15-7:15). In sum, ALJ Kocol credited Acting General Counsel witnesses and found that Respondent allowed employees to wear a myriad of buttons, pins, and stickers prior to May 2010, without incident, that Respondent's reason for revising the rule was that in March 2009 employees began to wear CNA buttons, that although Respondent revised its A&H

Policy in May 2010, the revised policy was not updated to reflect that it had been revised at that time. Finally, ALJ Kocol found Morgan's testimony attempting to explain why the revised policy did not reflect that it was revised in May 2010 to be completely incredible. (ALJD 4:13-7:15).

The ALJ's factual conclusion that Respondent promulgated its A&H Policy in May 2010, in response to the employees' union activity is well supported by the record. On or around May 14, the Respondent issued its revised A&H Policy prohibiting the wearing of unauthorized buttons, pins, and stickers in patient care areas. (R. Exs. 12 and 13; Tr. 301:24-302:2, 314:2-5, 575:16-580:22) As described more fully above in Section C(ii)(a), prior to May 14, Respondent had no policy relating to the wearing of buttons, pins, and stickers, and employees wore them freely around Respondent's facility without issue. After years without a policy relating to buttons, pins, and stickers, it wasn't until after a decertification petition involving SEIU was filed, and employees began to wear SEIU pins and buttons in support of SEIU that the Respondent promulgated its revised A&H Policy prohibiting unauthorized buttons, pins, and stickers in patient care areas. (Tr. 299:17-300:7, 372:13-17, 403:19-404:2). The credited evidence shows that the Respondent revised the policy around May 10, as current employee Falcon testified that in a meeting with chief executive officer Fred Hunter ("Hunter") regarding reports to Falcon by her co-workers of discrepancies in different departments regarding the wearing of buttons, Hunter told Falcon that the Respondent was "working on it right now as we speak." (Tr. 301:24-302:2). Hunter did not testify at the hearing, and as a current employee, Falcon's testimony is inherently credible because she is testifying against her pecuniary interest. *See Paramount Farms, Inc., supra.* Four days later, Respondent posted its revised A&H Policy. (R. Ex. 13; Tr. 78:9-15, 194:25-195:2, 303:6-14, 313:17-20, 319:24-320:8, 585:7-24). The

timing of the policy suggests that the policy was issued in response to employees' activities on behalf of SEIU and to prevent employees from wearing SEIU insignia.

Although Respondent explains the timing of the A&H policy's promulgation by pointing to two incidents in March and December 2009, the manner in which Respondent revised the policy led to the conclusion that Respondent moved hastily to issue the policy, suggesting that something occurring proximate in time to May 14 caused the Respondent to act. To this end, Respondent had never before updated an individual policy in the Manual, without an overall Manual review. (Tr. 600:18-25, 601:1-7). The update was so unusual that Respondent did not even provide for a mechanism by which the policy would be added to the copies of the Manual that are located in each department. (Tr. 448:7-10, 563:9-12, 596:7-23). Neither Bean nor Heasley could testify that the revised version of the A&H policy ever made it into the copy located in their departments, and Morgan testified that she didn't know if any department updated their Manual with the new policy. (Tr. 448:7-10, 563:9-12, 596:7-23). Respondent was so hasty to update its policy, that Respondent failed to update the "last reviewed" and "last revised" dates. (Tr. G.C. 18, 19, 20; Tr. 594:16-595:14). While Morgan testified that the "last revised" date did not need to be updated because its May 14 revision was not really a change in Respondent's practice, that does not explain why the other changes in the revised A&H policy did not amount to a revision, nor does it explain why the "last reviewed" date did not need to be updated. (Tr. 595:16-18). ALJ Kocol rightfully found this testimony incredible, noting that the Respondent's failure to update the A&H Policy in May 2010 suggested that the Respondent acted "at best...misleadingly, and at worst, dishonestly." (ALJD 4:49-52).

Perhaps the suspiciousness of the timing and the circumstances of the A&H policy's issuance could be overcome by a legitimate business reason for the issuance of the revised A&H

policy, but Respondent failed to offer one. Instead, as the ALJ found, Respondent claimed that two incidents in March and December of 2009, where employees wore buttons in patient care areas led the Respondent to issue the Revised A&H Policy on May 14. (Tr. 575:22-576:3, 580:2-22). Respondent's defense – that incidents in March and December of 2009 caused the revision of the A&H Policy in the Manual - is unlikely due to the great delay between the incidents and May 14, between six and fourteen months. In addition to offering no explanation for its six to fourteen month delay from the date of the incidents and the revision itself, a review of the policies themselves show that Respondent' explanation is not only unlikely, it is partially false. To this end, G.C. 20, the A&H policy in effect prior to May 14, reflects that the Respondent reviewed its A&H policy in August of 2009, just five months after the alleged March 2009 incident that led Morgan to revise the policy, yet the Respondent inexplicably failed to update the policy at that time. (G.C. Ex. 20). Respondent's failure to update the policy in August 2009, and Morgan's failure to explain why the Respondent did not do so, supports further the conclusion that something other than these claimed incidents prompted the revision.

In support of exception 17, Respondent argues that the revision of its A&H Policy did not violate Section 8(a)(1) of the Act as alleged in the Complaint because: (i) the policy has been in place since at least 2004; (ii) the policy has been consistently and uniformly enforced in a non-discriminatory manner; and (iii) the wearing of buttons related to an integral part of Respondent's community healthcare functions is not evidence of disparate treatment. (R. Br. 18-25).

However, as described more thoroughly above in Section C(ii)(a), starting on page 7, the ALJ correctly found that prior to May 14, Respondent had no policy relating to the wearing of buttons, pins, and stickers, and employees wore them freely around Respondent's facility

without issue. With respect to Respondent's remaining arguments that Respondent applied its A&H Policy in a non-discriminatory manner, Respondent appears to misunderstand the appropriate legal standard. The issue in the case at hand is whether the Respondent issued its revised A&H Policy in May 2010 in response to its employees union activities, and, not whether the Respondent discriminatorily applied its rule to restrict the exercise of employees' Section 7 rights. While both would be unlawful, the Acting General Counsel's Complaint alleges – and the ALJ found – that Respondent promulgated its A&H Policy in response to employees' union activities. (ALJD 7:38-43, 14:43-46). Therefore, regardless of whether or not Respondent's application of its A&H Policy was discriminatory, Respondent's A&H Policy itself was unlawful because it was promulgated in response to Union activity. *Lincoln Center for the Performing Arts*, 340 NLRB 1100, 1110 (2003)("[t]he issue is the motivation for [r]espondent's new policy or change of enforcement of an old policy."); *Asociacion Hospital Del Maestro*, 283 NLRB 419, 425 (1987) (promulgation and enforcement of a new rule or previously unenforced rule against wearing buttons or insignia in response to union activity); *Hyatt Regency Memphis*, 296 NLRB 259, 260-62 (1989) (more stringent enforcement of a sign-in, sign-out policy in response to union activities of employees); *Automotive Plastic Technologies*, 313 NLRB 462, 462 (1993) (prohibition of handbilling based on dormant rule or new rule issued in response to union handbilling activities of employees); *Jordan Marsh Stores*, 317 NLRB 460, 462 (1995) (promulgation of previously ignored rule in response to union activity); *City Market, Inc.*, 340 NLRB 1260, 1260 (2003) (enforcement of previously dormant policy in response to union activity).

Because the credible evidence shows that Respondent revised its A&H Policy on May 14 in response to its employees' activities on behalf of SEIU, Respondent exception 17 should be denied.

i. The ALJ's legal findings are well-supported by extant law (R. Exception 18)

There is no merit to Respondent's exception 18, which objects to ALJ Kocol's finding that the revised A&H Policy was unlawful, despite being facially valid (R. Exception 18). In finding that Respondent's A&H policy violated Section 8(a)(1) because it was promulgated in response to employees' union activities, the ALJ dismissed the Respondent's argument that its revised appearance and hygiene policy is presumptively valid. (ALJD 7:48-8:4). ALJ Kocol, citing *City Market, Inc.*, 340 NLRB 1260 (2003), concisely explained that Respondent's argument in this regard "confuses the promulgation of presumptively valid rules for nondiscriminatory reasons with the promulgation of the same rules in response in [sic] to union activity; in the latter circumstances, the promulgation of the rules, even if facially presumptively valid, is nonetheless unlawful." (ALJD 7:49-8:4).

ALJ Kocol's analysis is well grounded in Board law, and the Respondent's exception 18 should be overruled. The maintenance and enforcement of an unlawful rule, such as where the rule was promulgated in response to employees' union activities, violates Section 8(a)(1) whether or not the rule would have been lawful on its face. *Saint Vincent's Hospital*, 265 NLRB 38, 42, 46 (1982). As the Board has stated, where an employer maintains an unlawful rule, the rule is invalid for all purposes. *Id.* Thus, in *Saint Vincent's Hospital*, the Board found that an employer violated Section 8(a)(1) of the Act where a supervisor told an employee to remove her union pin pursuant to an unlawful rule, regardless of the fact that the instruction was issued in a patient care area, a directive that would have been lawful had the rule not itself been invalid. *Id.*

Because Respondent's A&H Policy was issued in response to its employees' union activities, the fact that it was facially valid is irrelevant, and Respondent's exception 18 should be denied.

E. The ALJ's factual and legal finding that Respondent violated Section 8(a)(1) by maintaining an overly-broad off-duty access policy is well-supported by the record evidence and extant law (R Exceptions 19, 20, 23)

i. The ALJ's credibility determinations are well-grounded (R. Exception 20)

There is no merit to Respondent's exception 20, which excepts to ALJ Kocol's finding that Respondent permitted employees off duty access to Respondent's facility to visit a patient, receive medical treatment, conduct hospital-related business, pick up a paycheck stub, submit a schedule request, apply for a transfer, and attend employee benefit meetings, retirement parties, baby showers, and wedding showers. (ALJD 11:20-39). Respondent's exception 20 fails to explain how the ALJ erred or the grounds on which his findings or conclusions should be overturned; and, therefore, should be denied because it does not comport with Section 102.46(b)(1) of the Board's Rules and Regulations.

Further, the ALJ's findings in this regard are well-supported by record evidence. Employees are permitted to access Respondent's facility when they are off-duty to attend baby showers[14] and retirement parties,[15] retrieve their paychecks,[16] to meet with insurance

---

[14] Heasley confirmed that employees are permitted and come to Respondent's facility off-duty to attend baby showers. (Tr. 466:5-18, 600:5-8). Mary Brown testified that she attended a baby shower for co-workers at Respondent's facility while she was off-duty on two or three occasions since she started working for Respondent in 2000. (Tr. 319:20-21, 335:4-6). Brown recalled that she most recently attended a baby shower for co-worker Mary Membrebe at Respondent's facility while off-duty in 2011. (Tr. 335:4-12). Gilmore also recalled attending a baby shower at Respondent's facility while she was off-duty in February of 2011. (Tr. 246:9-20).

[15] Both Morgan and Heasley testified that employees were permitted to attend retirement parties at Respondent's facility while off-duty. (Tr. 465:11-466:4, 605:25-606:3). Marla Liberty testified that she attended two retirement parties since 2006 while off-duty, most recently in Spring of 2010 for co-worker Beverly Espose. (Tr. 208:3-22, 225:24-226:7).

[16] Both Morgan and Heasley testified that employees were permitted to enter Respondent's facility while off-duty on a bi-weekly basis to obtain their paychecks. (Tr. 467:8-10, 591:4-7, 600:9-12, 606:2-15). Both Marla Liberty and Mary Brown testified that they picked up their paychecks from Respondent's facility while off-duty. (Tr. 208:3-7,

representatives regarding employee benefits,[17] submit a schedule request,[18] and to apply for a transfer.[19] Respondent did not direct them to attend these events and did not pay them for their attendance. (Tr. 599:22-600:12, 603:7-604:3). Although Morgan testified that she could think of no reason that the Respondent would specifically direct an employee to appear at the facility when they were off-duty, Heasley testified that employees would be paid to appear while off-duty at Respondent's facility to take classes such as an advanced life support class. (Tr. 435:16-23, 605:3-19). The record evidence shows that the No-Access Policy has been enforced on only two occasions, described below, and only against off-duty employees who were on Respondent's premises while accompanied by an SEIU or CNA representative.

Because ALJ Kocol's finding is well supported by the record, Respondent's exception 20 should be overruled.

ii. The ALJ's legal conclusions are well-supported by extant law (R. Exceptions 19, 23)

There is no merit to Respondent's exceptions 19 and 23, which except to the ALJ's legal analysis in finding that Respondent's off-duty access policy is unlawful under *Sodexo America,*

334:25:335:3) Liberty on a bi-weekly basis between January 1986 and March 2012, and Mary Brown from September 18, 2000, until around 2010 when she began to use direct deposit to receive her paychecks. (Tr. 211:19-212:23, 319:20-21, 338:10-339:1). Marla Liberty also testified that she had entered the facility while off-duty to pick up her paycheck or pay stub and would talk to her friends in the ICU and the telemetry units while she was there. (Tr. 208:3-7, 212:18-22).

[17] Morgan testified that employees were permitted to enter the Respondent's facility while off-duty to attend employees benefit meetings. (Tr. 591:4-7). Although Morgan did not elaborate on what an employee benefit meeting entailed, employee Marla Liberty testified that she attended these employee benefit meetings while off-duty with representatives of insurance companies to discuss employee benefits. According to Liberty, these meetings with insurance representatives regarding employee benefits were held on a yearly basis each fall. (Tr. 211:3-12). Most recently, Liberty attended a meeting with insurance representatives regarding employee benefits while she was off-duty in the fall of 2003. (Tr. 211:13-15).

[18] Morgan testified that employees were permitted to enter Respondent's facility while off-duty for the purpose of submitting a schedule request. (Tr. 591:4-7).

[19] Morgan testified that employees were permitted to enter Respondent's facility while off-duty for the purpose of applying for a transfer. (Tr. 591:4-7).

LLC., 358 NLRB No. 79 (July 3, 2012).[20] Relying, on *Sodexo America,* ALJ Kocol found that by maintaining an off-duty access rule that on its face allows the Respondent "free rein to allow off-duty access to the facility for certain activities but forbidding such access for activities protected by Section 7 of the Act," the Respondent violated Section 8(a)(1). *Sodexo, supra* at *2. (ALJD 10:46-11:18). ALJ Kocol's conclusion is supported by Board law.

> The No-Access Policy in the Handbook states that:
>
> > Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or has not yet commenced his/her assigned shift.
> >
> > An off-duty employee is not allowed to enter or re-enter the interior of the hospital or any Hospital work area, except to visit a patient, receive medical treatment or to conduct hospital-related business. "Hospital-related business" is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
> >
> > An off-duty employee may have access to non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.
> >
> > Any employee who violates this policy will be subject to disciplinary action up to and including termination.
> > (Joint Ex. 3).

In support of exception 23, Respondent argues that legal and public policy concerns require the Respondent to allow access to off-duty employees for medical treatment, to review their personnel files, to discuss an accommodation for a disability, to pick up their paychecks, and to visit a patient. (R. Br. 25-29). Respondent's exception 23 does not address how the fact that Respondent allows off-duty employees access to its facility for baby showers, wedding showers, and retirement parties affect the analysis. *Id.* In its exception 19, Respondent objects to the ALJ's legal conclusion that the Respondent's off-duty access rule violated Section 8(a)(1) of the Act.

[20] To the extent that ALJ Kocol's citation of *Sodexo America LLC*, as 358 NLRB No. 78 (July 3, 2012) contained a typographical error (the correct cite is 358 NLRB *No. 79*), this does not affect the Decision in this matter.

The ALJ's legal analysis with respect to the Respondent's No-Access Policy is well-reasoned and supported by Board law. In *Tri-County Medical Center*, the Board established that an employer's rule barring off-duty employees from access to its facility is valid only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

Saint John's Health Center, 357 NLRB No. 170, slip op. at *3-4 (Dec. 30, 2011), *citing Tri County Medical Center*, 222 NLRB 1089, 1089 (1976).

Applying the *Tri-County Medical Center* test to Respondent's off-duty access rule, it clearly meets the first two prongs. The first prong is met because the off-duty access rule applies to the "interior of the hospital or any Hospital work area," and specifically excludes the "non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots." (J. Ex. 3). Secondly, it is undisputed that the policy was disseminated to all employees, as the parties so stipulated. (Tr. 361:9-19).

Application of the third prong of the *Tri-County* test, however, renders Respondent's rule invalid because it does not uniformly prohibit access by off-duty employees seeking entry to the property for any purpose. *See, e.g., St Johns' Health Center*, *supra* at *5. Despite its definitive language, the Board has not interpreted the third prong of *Tri-County* to invalidate an off-duty access policy that restricts access of off-duty employees for all purposes except to visit a patient or receive medical treatment. The Board reasoned that in the circumstances where an off-duty employee were to seek access to the employer's facility to visit a patient or to receive medical treatment, that employee would be granted or denied access on the "same basis and under the same procedures as for members of the public." *Sodexo, supra* at *2 (July 3, 2012). If

Respondent's off-duty access rule prohibited all off-duty employee access except to visit a patient or receive medical treatment, it is likely that the Board would find that Respondent's rule comported with *Tri-County*. However, Respondent's off-duty access policy creates a third exception for off-duty employees to gain access to Respondent's facility, for "hospital related business." Respondent's rule defines "hospital related business" as the "pursuit of the employee's normal duties" or "duties as specifically directed by management." In, *Sodexo*, the employer's off-duty access rule contained an identical exception. There, the Board held the off-duty access policy unlawful because, unlike the exceptions for visiting a patient and receiving medical treatment, the exception for "duties as specifically directed by management," gave the employer "unlimited discretion to decide when and why employees may access the facility," and, therefore "does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose. *Sodexo*, *supra* at *2. Similarly, in, *Marriott International, Inc.*, 359 NLRB No. 8, slip op. at *1-2 (Sept. 28, 2012), the Board found an off-duty access rule invalid when it prohibited access to the employer's facility by off-duty employees in all circumstances except where employees obtained "prior approval from [his or her] manager," because the employer retained unlimited discretion to decide when and why employees could access the facility. Here, Respondent's No-Access policy restricts off-duty access except for "duties as specifically directed by management," giving unfettered discretion to decide when and why its employees may access the property off-duty. While Respondent is not clear about the reasons for which employees would be permitted or denied off-duty access, the evidence shows that Respondent has restricted access only to off-duty employees who were accompanied by union representatives. (Tr. 62:14-63:23, 64:15-22, 133:14-134:24, 135:2-5, 136:5-20, 201:18-203:2, 206:2-207:21, 391:16-19, 392:1-12, 434:12-433:4, 515:13-18, 516:18-519:2, 541:25-542:1)

In light of the foregoing, Respondent's exceptions 19 and 23 should be denied.

F. The ALJ properly found that Respondent violated Section 8(a)(1) on August 20, 2010, when Patricia Heasley enforced Respondent's overly-broad off-duty access policy against employees (R. Exception 21)

There is no merit to Respondent's exception 21, which objects to the ALJ's finding that on August 20, Heasley enforced Respondent's overly-broad no-access policy against Liberty to remove her from the cafeteria while she was off-duty. (ALJD 13:1-12).

Respondent excepts that the ALJ credited Acting General Counsel's witnesses, Marla Liberty and Glynnis Golden Ortiz, over Respondent's witnesses, Patricia Heasley and Julio Duarte. (R. Br. 29-32).

In making his credibility resolutions, ALJ Kocol assessed the demeanor of the witnesses, considering the overall logic of their testimony, and factoring in corroboration or lack thereof. ALJ Kocol explained that he found the demeanor of Respondent's witnesses, Patricia Heasley and Julio Duarte "uncertain and unconvincing," noting that Heasley testified that she did not recall the incident and that Duarte testified that he was not present for any conversation with Heasley. (ALJD 12:42-49). ALJ Kocol further credited the testimony of Acting General Counsel's witness Liberty because her demeanor was "convincing," she was employed by Respondent at the time she provided testimony, and because her testimony was partially corroborated by a second Acting General counsel witness, CNA representative Glynnis Golden Ortiz ("Ortiz"). (ALJD 12:42-49). As described more fully above in Section C(ii), ALJ Kocol's credibility resolutions should not be overruled because he based them on the employees' demeanor and provided explanations of his credibility determinations.

In addition to the ALJ's own explanations of his credibility determinations, ALJ Kocol's credibility resolutions are well supported by the record evidence. The testimony of Liberty

regarding the conversation with Heasley in the hallway outside of the cafeteria should be credited over the testimony of Duarte and Heasley because it was corroborated by Ortiz, and because Liberty's testimony had the ring of truth. To this end, Liberty recalled the time of day that she arrived and the time that Duarte first spoke with her. (Tr. 201:18-202:1, 203:23-204:12, 515:13-18, 541:25-542:1). Liberty also recalled other specific details of that morning, like the telephone calls with Richardson and Carol and that Duarte jokingly accused her of dancing on the tables in the cafeteria. (206:15-207:14) Duarte's testimony on the other hand was vague and incomplete, failing to testify about who called him that morning to tell him that Ortiz and Liberty were in the cafeteria, and what time he received the telephone call, and when he arrived in the cafeteria that morning. (Tr.515:13-18, 541:25-542:1). Similarly, Heasley's general and incomplete testimony is insufficient to credit her testimony over Liberty's detailed testimony. (Tr. 434:132-433:4). In addition to generally denying the incident altogether, Heasley also failed to rebut or otherwise address other aspects of that morning, such as Liberty's testimony that Heasley was present for the telephone conversation between Liberty and Carol when Liberty called Carol to ask if she and Ortiz could use the ICU Lounge to meet with nurses. (Tr. 434:12-433:4). *LSF Transportation*, 330 NLRB 1054, 1063 n. 11 (2000)(drawing adverse inference against respondent for failing to elicit denials from witnesses who testified regarding unlawful statements alleged to have been made by them).

Because ALJ Kocol properly credited Acting General Counsel's witnesses over Respondent's witnesses, Respondent exception 21 should be denied.

G. The ALJ properly found that Respondent violated Section 8(a)(1) on September 21, 2011, when Julio Duarte enforced Respondent's overly broad off-duty access policy against employees (R. Exception 22)

There is no merit to Respondent's exception 22, which objects to ALJ Kocol's finding that because Respondent's off-duty access rule was unlawful on its fact, it could not serve as the basis for excluding off-duty employee Navarro from entering the facility to engage in activities protected by the Act. (ALJD 13:1-12). ALJ Kocol's finding is supported by Board law.

As discussed fully above in Section E, Respondent's off-duty access rule was overly broad, and therefore invalid under *Tri-County*. Enforcement of an invalid or overly broad rule itself violates Section 8(a)(1). *Saint John's Health Center*, *supra* at 19 (Dec. 30, 2011); *Sodexo*, *supra* at *4; *Saint Vincent's Hospital*, *supra* at 42; *Asociacion Hospital*, *supra* at 426. Because the credible evidence established that Respondent enforced its overly broad off-duty access policy against Navarro on September 21, 2011, Respondent violated Section 8(a)(1) of the Act. (ALJD 12:50-51).

Because the ALJ properly found Respondent violated Section 8(a)(1) on September 21, 2011, by enforcing its unlawful off-duty access rule against Liberty, Respondent's exception 22 should be denied.

H. The ALJ's finding that Respondent violated Section 8(a)(1) and (5) by failing to make contributions to the SEIU and Joint Employer Education Fund is well-supported by record evidence and extant law (R. Exceptions 25, 26)

ALJ Kocol concisely set forth the facts and his legal analysis for this finding. (ALJD at 14:5-35). While ALJ Kocol did not specifically describe the basis for his factual finding, it is well supported by the record evidence which is set forth pursuant to a stipulated record introduced into evidence as Joint Exhibit No. 2 (J. Ex. 2). Joint Ex. 2 includes three respective documents attached and made part thereof. (Tr. 13:5-14:6).[21] More specifically, Joint Ex. 2 includes a true and correct copy of (a) the "Trust Agreement," (b) the Education Fund's Plan

[21] On November 14, 2012, Counsel for the General Counsel filed a Motion to Correct Exhibits and Transcript to include, inter alia, three documents to Joint Exhibit No. 2 as mentioned herein.

Document (entitled "Plan Description"), and (c) the rules and regulations adopted by the Trustees of the Fund (entitled 'Revised/Updated Contribution Policy"). These three documents were incorporated by reference in Article 18, Section C of the CBA. (J. Ex. 5 (CBA) at 51)(J. Ex. 2 (Stipulation) at 1) (TR 13:5-14:6).[22]

i. Respondent was obligated to maintain the status quo, including fund contributions after the expiration of the CBA

Contrary to Respondent's arguments, (R. Br. 39-41), Board law is clear that an employer's obligation to make contractual benefit fund contributions continues beyond the expiration date of a collective bargaining agreement until the parties either reach a new contract or reach a good faith impasse on negotiations. See *Oak Harbor Freight Lines, Inc.,* 358 NLRB No. 41, slip op. at 12, (May 2012); *Made 4 Film, Inc.*, 337 NLRB 1152, 1152 (2002). This is so because an employer has a statutory obligation to continue to follow terms and conditions of employment governing the employer-employee relationship in an expired contract (i.e., the status quo) until a new contract is concluded or impasse is reached. See *R.E.C. Corp.,* 296 NLRB 1293 (1989).

The status quo obligation includes making contributions to fringe benefit funds "specified in the expired collective bargaining agreement," as such funds are considered mandatory subjects for the purpose of collective bargaining. *N. D. Peters & Co.*, 321 NLRB 927, 927-928 (1996). Mandatory post-expired contract payments to a fringe benefits fund include, *inter alia*, payments to a union welfare fund, and a union's welfare plan. See, *Made 4 Film*, 337 NLRB at 1155-56

[22] The relevant language in the respective three documents includes the following: (1) Trust Agreement – Recitals – No. 1: (J. Ex. 2 (Trust Agreement) at 21); (2) Trust Agreement - Article 1- Definitions – Section 2: "collective bargaining agreements" (J. Ex. 2 (Trust Agreement) at 22); (3) Trust Agreement- Article 1 – Definitions – Section 5: "Individual Employer" (J. Ex. 2 (Trust Agreement) at 22); (4) Trust Agreement - Article IX Amendment and Termination- Section 1:. (J. Ex. 2 (Trust Agreement) at 37-38); (5) Trust Agreement - Article IX Amendment and Termination- Section 2. (J. Ex. 2 (Trust Agreement) at 38); (6) Trust Agreement - Article IX Amendment and Termination- Section 3. (J. Ex. 2 (Trust Agreement) at 38); (7) Plan Description – Definitions – A.: "Collective Bargaining Agreement" (J. Ex. 2 (Plan Description) at 18).; and (8) Plan Description – Definitions – D. "Employer" (J. Ex. 2 (Plan Description) at 18).

(failure to make payments to the union's welfare fund post contract expiration found to be unlawful unilateral change under 8(a)(5)); *Schmidt-Tiago Construction Co., Local Union No. 13*, 286 NLRB 342, 342, 363 (1987) (discontinuance to contractual benefit plans such as welfare plan constitutes unlawful unilateral changes under 8(a)(5) when occurring post contract expiration). Payment to such welfare plans (including health and pension funds) is part of an expired contract and constitutes an aspect of employees' term and condition of employment which survives the expiration of the contract. *Cauthorne Trucking*, 256 NLRB 721, 721-722 (1981).

The Education Fund here is a type of welfare benefit fund similar to the one in *Made 4 Film* in that it is based on contractually-required employer contributions on behalf of SEIU represented employees to the Fund. (J. Ex. 2 (Plan Description) at 17- 18) (J. Ex. 5 (CBA) at 51). Unlike the employer in *Made 4 Films* who did not make *any* contributions, here, Respondent admits that, as required by the CBA, it made two contractually required contributions to the Fund, in the amount of $28,635.70 and $21,915.30 in 2009 and 2010, respectively. (J. Ex. 2 (Stipulation) at 1). Respondent made no contributions to the Fund for the calendar years 2010 forward despite the fact that no new contract or good faith impasse had been reached. *Id.* Although some discussions between the parties occurred during negotiations for a successor collective-bargaining agreement, when Respondent proposed eliminating Article 18, Section C., SEIU did not agree to such proposal and no agreement was ever reached. *Id.*

In fact, the evidence reflects that even after the expiration of the CBA, the Fund expected that Respondent would continue to pay contractually required payments to the Fund, as evidenced by the Fund's Director of Finance, Victor Madamba's February 16, 2011 letter to Respondent reminding it that payment was due. (J. Ex. 2 (letter dated February 16, 2011) at 41).

Respondent provided no evidence that it notified or provided SEIU with an opportunity to bargain over Respondent's decision to discontinue making contributions to the Fund in 2011 or subsequently.

Consequently, ALJ's Kocol's findings and conclusions are fully supported by the record evidence and case law. (ALJD at 14:5-35). Contrary to Respondent's exceptions 25, 26, 32 and 36, there can be no question that Respondent violated Section 8(a)(5) as alleged, by, without notice nor an opportunity to bargain to SEIU, unilaterally ceasing contributions to the SEIU Fund, after expiration of the parties CBA, and without there being a new contract or good faith impasse.

ii. Contrary to Respondent's contentions, SEIU did not clearly and unmistakably waive its right to continued fund contributions

Respondent's main argument for exceptions 25 and 26 rests solely on Respondent's self-serving interpretation of the definition of "Employer" noted in the Plan Description - one of three documents attached to J. Exhibit No. 2. (J. Ex. 2 (Plan Description) at 18). Respondent's argument that it is not required to continue making contributions to the Education fund because there is no collective bargaining agreement "presently in force" is unsupported by citation to a single Board case, and is contrary to long established case law. (R. Br. 39-41).

For a Union to waive employer contractually obligated fund/welfare contributions payments, the provisions in a collective bargaining agreement and related documents must contain explicit contract language authorizing an employer to terminate its obligations. See *Oak Harbor Freight Lines, Inc., supra* at 12-14.

Here, the parties' agreements encompassed in the language contained in three documents incorporated by reference in Article 18, Section C of the CBA, do not contain explicit language

authorizing Respondent to cease making contributions to the Fund. (J. Ex. 5, at 51). In the absence of such language, the Board has repeatedly found no waiver by the union of its right to insist on continued contributions. Consequently, Judge Kocol correctly relied on *KBMS, Inc.*, 278 NLRB 826 (1986), for finding Respondent's obligation to continue payment of Education Fund payment contributions survive contract expiration. (ALJD 14:33). In *KBMS*, a case involving waiver of trust payments, the employer contended that article III, section 2 of the agreement and declaration of trust prohibited contributions after the expiration of the bargaining agreement. *Id.* at 849. That section provided:

> ARTICLE III. Contributions to the Funds
> SECTION 2. *Effective Date of Contributions.*
> All contributions shall be made effective as of the date specified in the Collective bargaining agreements between AFTRA and the Producers, and *said contributions shall continue to be paid as long as a Producer is so obligated pursuant to said collective bargaining agreement.* [Emphasis added.]

Id.

The administrative law judge in *KBMS* , with Board approval, found that the declaration of trust language did not constitute a clear and unmistakable waiver since that section did not purport to deal with the termination of the employer's obligation to contribute to the funds. As such, the administrative law judge concluded the employer's obligation to pay such contributions survived contract expiration. *Id.* In addressing the employer defense that the above noted language privileged it from discontinuance of payments, the Board adopted the judge's ruling that such language was "at best ambiguous" for the employer's proposition. *Id.* By so ruling, the Board implied such language did not constitute explicit language authorizing an employer to terminate its obligations necessary to establish a clear and unmistakable waiver to be imputed to the Union. *See American Distributing Co.,* 264 NLRB 1413, 1415 (1982) (language stating that

parties must certify that a collective bargaining agreement is in effect to allow for pension contributions did not constitute clear or unequivocal waiver of the employer's obligation to make trust fund payments post contract expiration); *Natico, Inc.,* 302 NLRB 668, 684-685 (1991) (language stating that pensions program "will remain in effect for the term of the agreement" insufficient to find a waiver of union for employer to terminate program upon expiration of agreement). But see *Cauthorne Trucking,* 256 NLRB at 722 (1981) (Board found waiver where pension agreement expressly stated that it "shall terminated, unless, in a new collective bargaining agreement, such obligation shall be continued"); *Oak Harbor Freight Lines, Inc.*, *supra* at 14 (finding a waiver by the Union to receive fund contributions where trust agreement language explicitly stated that the employer's obligations under the trust agreements pursuant to the expired bargaining agreement would continue until one party exercised its contractual right to notify the other "of its intent to cancel such obligation.")

As properly concluded by ALJ Kocol, the applicable contractual documents including the CBA, Trust Agreement, Plan Description and/or the Revised/Updated Contribution Policy, do not contain explicit contract language authorizing an employer such as Respondent to terminate its obligations to contribute to the Fund. In fact, the documents do not even mention at what point an Employer's obligation to contribute to the Fund will terminate.

The applicable contractual documents establish the obligation for Respondent to make contributions and provide for the duration of Respondent's contributions; they do not expressly provide for the termination of such payments. First the contractual documents establish Respondent's obligation to "pay contributions under the terms of" their respective CBA's which, under Article 18, Section C of the applicable CBA herein, requires Respondent to "contribute .22% of ... unit's annual gross payroll to the [Fund]." Termination of Respondent's obligation is

not addressed. (J. Ex. 5 (CBA) at 51). Second, the language in the Trust Agreement grants the Board of Trustees the power to terminate such agreement, with consent of the union and the employer. This language does not address nor does it grant Respondent itself the power to terminate payments. This language likewise requires consent from the union, in this case, SEIU, which consent is obviously not present herein. (J. Ex. 2 (Trust Agreement- Article IX- Section 1-2) at 37-38). Finally, the definition of an "Employer" in the applicable Plan Description and Trust Agreement, obviously applicable to Respondent herein, imply a continuing obligation to make contributions beyond any particular expiration of contract date by stating, respectively, that an employer means: "each employer who has presently in force, or who *hereafter* executes a [CBA] with the Union," (J. Ex. 2 (Plan Description Definition D) at 18) and "any employer who is required by any of the [CBAs] to make contributions to the fund, *or does in fact make one or more contributions to the fund.*" [Emphasis added.] (J. Ex. 2 (Trust Agreement Definitions-Section 5) at 22). Again, termination of an employer's obligation such as Respondent is not addressed and the facts herein clearly establish Respondent both executed a CBA with SEIU and made one or more contributions to the Fund. As noted in *KBMS, Inc., supra*, which ALJ Kocol properly cited, Respondent's claim that the definition of "Employer" in the Plan Description grants Respondent the right to terminate welfare fund contributions beyond expiration of the contract (R. Br. 39-41) would be "at best, ambiguous."

As such, because none of the relevant documents in the instant dispute contain explicit contractual language authorizing Respondent to terminate its obligations to contribute to the Fund, Respondent's exceptions Nos. 25 and 26 should be denied.

iii. Respondent's "sound arguable basis" interpretation-of-contract defense is not applicable to this unilateral change/failure to bargain 8(a)(5) allegation.

Respondent's alternative argument that at a minimum, it has a "sound arguable basis" for its interpretation of the contract, and the case law relied upon for such claim, do not apply to the instant dispute and are gravely misplaced. The Board has explained that the "sound arguable basis" defense is only proper where the complaint alleges a contract-modification/failure-to-adhere-to-the-contract violation within the meaning of Section 8(d), as opposed to a unilateral-change/failure-to bargain-allegation under Section 8(a)(5). *See Bath Iron Works Corp.*, 345 NLRB 499, 501-502 (2005). Section 8(d) provides, in relevant part, that "where there is in effect a collective bargaining contract . . . no party to such contract may terminate or modify such contract. *Id.* at 501.

Here, it is clear that Complaint paragraph 12(c)[23] dealing with the cessation of payments to the education fund is pled as a unilateral change violation, which, when read in conjunction with complaint paragraph 24,[24] allege a violation of Section 8(a)(1) and (5) of the Act without implicating Section 8(d). Consequently, ALJ Kocol properly rejected Respondent's "sound arguable basis defense."

Consequently, the record evidence and extant case law fully support ALJ Kocol's findings and conclusions that Respondent violated Section 8(a)(1) and (5) by unilaterally discontinuing payments contributions to the SEIU Joint Employer education fund as alleged by Complaint allegation 12(c).

---

[23] Complaint paragraph 12(c) reads: (c) Since May 2011, the Respondent has unilaterally ceased making contributions to the SEIU United Healthcare Workers West and Joint Employer Education Fund.

[24] Complaint Paragraph 24 reads: By the conduct described above in Paragraphs 12-15, Respondent has been failing and refusing to bargain collectively and in good faith with SEIU, the exclusive collective-bargaining representative of its SEIU unit employees in violation of Section 8(a)(1) and (5) of the Act.

I. Respondent's procedural exceptions should be denied as they fail to state on what grounds they are purportedly erroneous (R. Exceptions 34-36, 38)

i. Respondent's bare exceptions should be denied (R. Exceptions 34-36)

In its exceptions 34-36, Respondent excepts to ALJ Kocol's remedies and Order. In support of exceptions 34-36, Respondent provides no grounds, in either its exceptions or in its brief, that ALJ Kocol's remedies and Order should be overturned. As described more thoroughly above in Section B, where, as here a Respondent fails to state on what grounds the purportedly erroneous findings or conclusions should be overturned, the exception should be denied for failing to comply with the requirements of Section 102.46(b) of the Board's Rules and Regulations.

Respondent's exceptions 34-36, should also be denied because they are well-supported by extant law, for the reasons stated below.

ii. The ALJ's remedies and orders are well-supported by extant law (R. Exceptions 34-36)

a. Respondent's Exception 34

There is no merit to Respondent's exception 34, which takes issue with ALJ Kocol's Order requiring Respondent to "[r]escind the following from the appearance and hygiene policy: "'Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas.'" (ALJD 16:25-26).

Alternatively, ALJ Kocol's Order requiring Respondent to rescind the portion of its rule that was promulgated in response to employees' union activity is supported by long standing Board law. In fact, ALJ Kocol's Order requiring rescission is a traditional remedy ordered by the Board in cases such as this one, where an employer rules violates Section 8(a)(1) because it is promulgated in response to its employees' union activities. *See, e.g. Lincoln Center*, *supra* at 1101; *see also, Asociacion Hospital*, *supra* at 428.

Therefore, Respondent's exception 34 should be denied.

b. Respondent's exception 35

There is no merit to Respondent's exception 35, which objects to the ALJ's Order requiring Respondent to rescind "the no-access rule that on its face allows the Hospital free rein to allow off-duty access to facility for certain activities but forbidding such access for activities protected by Section 7 of the Act," and to "allow off-duty employees to enter the facility engage in union activity." (ALJD 16:27-34).

The ALJ's Order to rescind the no-access rule is appropriate and in line with Board precedent. *See, e.g. Sodexo,* supra at * 4 (ordering the respondent to "[r]escind the off-duty access policy to the extent that it permits off-duty employee access to the facility for some purposes while barring off-duty access for other purposes"); *Saint Johns', supra* at * 7. The Respondent cites no cases in support of its argument that ALJ Kocol's remedy is inappropriate. Because ALJ Kocol's Order is supported by Board law, and because the Respondent cites no authority upon which his Order should be overturned, Respondent's exception 35 should be denied.

With respect to ALJ Kocol's Order requiring Respondent to allow off-duty employees to enter the facility to engage in union activity, the ALJ's Order is appropriate in light of the facts of this case at bar. To this end, not only does the ALJ properly find that Respondent maintained its overly-broad off-duty access policy in violation of Section 8(a)(1), but also that on two occasions, on August 20, 2010, and September 21, 2011, Respondent enforced its overly-broad off–duty access policy against two different employees who were meeting with their union representatives in Respondent's cafeteria. As a result, ALJ Kocol's Order appropriately orders Respondent to allow its employees access to the facility to engage in union activity.

Therefore, Respondent's exception 35 should be denied.

c. Respondent's exception 36

There is no merit to Respondent's exception 36, which excepts to the ALJ's Order requiring Respondent to "make unit employees covered by the Education Fund whole in a manner described in the remedy section of this decision." (ALJD 16:34-35).

The ALJ's Order to make employees whole is appropriate and in line with Board precedent. *See, e.g. Oak Harbor Freight Lines, supra* at *4 (finding employer unilaterally ceased making fund payments and ordering employer to make unit employees whole by paying all delinquent contributions to the fund). The Respondent cites no cases in support of its argument that ALJ Kocol's remedy is inappropriate. Because ALJ Kocol's Order is supported by Board law, and because the Respondent cites no authority upon which his Order should be overturned, Respondent's exception 36 should be denied.

iii. Respondent's exception 38

There is no merit to Respondent's exception 38, which excepts to "any and all portions of the ALJ's decision which rely upon any decision or order of the Board that was issued when the Board was without a quorum to issue said decision or order as determined in *Noel Canning v. NLRB,* __ F.3d __, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013)." Respondent, in its brief or in its exceptions, fails to specifically explain how the ALJ erred or to state the grounds for the exception; and, therefore, as described more fully above in Section B, Respondent's exception does not comport with Section 102.46(b)(1) of the Board's Rules and Regulations. On this basis, Respondent's exception 20 should be denied.

Alternatively, the Respondent's exception 38 must fail because the Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and, on March 12, 2013, the Board announced that it, in consultation with the Department of Justice, intends to file a

petition for certiorari with the United States Supreme Court seeking review of the D. C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB, supra* at *14-15 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."

In light of the foregoing, Respondent's exception 38 should be denied.

CONCLUSION

ALJ Kocol's findings of fact and conclusions of law are well supported by the record and applicable Board law. As such, Counsel for the General Counsel respectfully requests that Respondent's exceptions be denied in their entirety. ALJ Kocol's decision and recommended order should be adopted and Respondent be found to have violated the Act, as alleged.

Dated at Los Angeles, California, this 12th day of April, 2013

Rudy Fong-Sandoval
Nicole A. Buffalano
Counsel for Acting General Counsel
National Labor Relations Board – Region 31
11500 West Olympic Blvd. – Suite 600
Los Angeles, CA 90064

Re: MARINA DEL REY HOSPITAL
Cases: 31-CA-29929, 31-CA-29930, 31-CA-30191, 31-CA-65298
CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 12th day of April, 2013:

SERVED VIA E-FILING

Gary W. Shinners
Executive Secretary
National Labor Relations Board
www.nlrb.gov

SERVED VIA EMAIL:

Mark W. Robbins, Esq.
Littler Mendelson, PC
MRobbins@littler.com

Rich S. Falcone. Esq.
Littler Mendelson, PC
RFalcone@littler.com

Martha Fernandez, Esq.
Patricia M. DeSantis, Esq.
Jeffer Mangles Buttler & Mitchell LLP
mmf@jmbm.com
pmd@jmbm.com

Monica Guizar, Esq.
Weinberg, Roger & Rosenfeld
MGuizar@unioncounsel.net

Brendan White, Esq.
California Nurses Association
BWhite@CalNurses.Org

Roxanne Robinson
Compliance Assistant
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064